No. 86-678

In the Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK R. SILVESTRI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence that was discovered as a result of an illegal entry, but would inevitably have been discovered through a valid search under a warrant that the government had already decided to obtain, may be admitted at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-43) is reported at 787 F.2d 736.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1986. The petition for a writ of certiorari was filed on June 2, 1986, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in

violation of 21 U.S.C. 846. He was sentenced to imprisonment for a year and a day. The court of appeals remanded the case to the district court to make findings on certain factual issues relating to petitioner's motion to suppress marijuana found in his garage. *United States* v. *Curry*, 751 F.2d 442 (1st Cir. 1984). On remand, the district court denied the suppression motion. The court of appeals affirmed (Pet. App. 1-43).

1. The pertinent evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4-6). It showed that sometime between 3:00 and 3:30 a.m. on April 30, 1982, police officers entered and secured property owned by petitioner in New Durham, New Hampshire, pending the arrival of a search warrant. The officers had been told by other police officers that there was reason to believe that large quantities of marijuana were present on the property and that they should secure the premises (*id.* at 4).

There were two buildings on the property: a single-family dwelling, occupied by petitioner, and an apartment over a garage, occupied by the estranged wife of petitioner's son. All occupants of the residences were awakened, and the police fanned out through the dwellings to ensure that no other persons were inside. Sometime before the arrival of the search warrant, Sergeant DuBois asked petitioner, who was being detained, if the garage was open. On learning that the garage was locked, Sergeant DuBois asked for the key, and petitioner provided it. Sergeant DuBois unlocked the garage and looked inside; in the garage, he saw a number of bales of marijuana and blocks of hashish. Pet. App. 4-5.

Sergeant DuBois then called the state police barracks in Epping, New Hampshire, and reported that he had found marijuana in the garage. A search warrant was ultimately obtained by the same officer who had ordered the premises secured, and it arrived in New Durham at 11:30 that morning. At that time, the police seized 99 bales of marijuana

from the garage, a truck registered to petitioner containing 1489 pounds of hashish, and a block of hashish in petitioner's house. Pet. App. 5-6.

2. Before trial, petitioner moved to suppress the evidence found in his garage. He argued, among other things, that the warrantless entry into the garage was unlawful and that the search warrant was unsupported by probable cause. The district court ruled that the affidavit supporting the warrant provided probable cause to search the property. Although it agreed with petitioner that the warrantless entry was unlawful, it concluded that no information obtained as a result of the entry was necessary to the finding of probable cause (751 F.2d at 447, 449). Accordingly, the court denied the suppression motion.

The court of appeals remanded the case for further factual findings. The court noted that the Second Circuit had held that evidence discovered in plain view during an unlawful prewarrant entry must be suppressed. *United States* v. *Segura*, 663 F.2d 411, 417 (2d Cir. 1981), opinion after remand, 697 F.2d 300 (1982), aff'd on other grounds, 468 U.S. 796 (1984). In light of *Segura*, the court directed the district court to determine what evidence introduced at trial, if any, was observed in plain view during the initial illegal entry (751 F.2d at 449).

3. On remand, the district court found that the only evidence discovered by the police during the initial unlawful entry was the marijuana and hashish in the garage. The court went on to find, however, that that evidence was admissible at trial under the inevitable discovery doctrine. In so holding, the court concluded that the evidence would inevitably have been discovered during the later warrant-authorized search and that preparation of the warrant application had begun by the time the evidence was found. Pet. App. 7-8.

Petitioner appealed again. First, the court of appeals agreed with petitioner that the district court had erred in finding that the process of preparing the search warrant application had begun at the time of the discovery of the evidence in the garage (Pet. App. 19-24). The court declined, however, to adopt a rule under which the legal process for discovering the evidence must already have been set in motion at the time of the illegal action in order for the inevitable discovery doctrine to apply (*id.* at 37-41). The court acknowledged that active pursuit by the police of a legal avenue of investigation at the time of the unlawful act would be necessary in some cases to establish that the discovery of the evidence was inevitable, but it concluded that that was not the case here (*ibid.*). The court explained that, by the time petitioner's property was secured, the decision to obtain a search warrant had already been made (*id.* at 39). The court also explained that that decision was in no way "influenced or accelerated" by the discovery of the drugs in the garage (*ibid.*). The court observed that the delay between the search of the garage and the initiation of the warrant process was attributable to the time it took the officers charged with obtaining the warrant to complete their duties relating to this case in Massachusetts and to drive back to New Hampshire (*id.* at 38).[1]

The court rejected the argument that the suppression of evidence in cases like this one is necessary to remove what would otherwise be an incentive to police to take a chance that the inevitable discovery rule might save the evidence in

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[1]The officers were engaged in surveillance of petitioner's property in New Durham when they began following a truck that left the property. They followed the truck to Massachusetts and later participated in an arrest. They then were interviewed by district attorneys in Massachusetts for the purpose of obtaining search warrants to be executed there. They began preparing the warrant application at issue here when they returned to New Hampshire. Pet. App. 21.

a situation where the discovery of the evidence seemed doubtful (Pet. App. 39-40). The court explained that, "[i]f the demands that the legal means of obtaining the evidence be both inevitable and independent are strictly enforced, post hoc suggestions of alternate legal means will not be accepted as a basis for application of the inevitable discovery exception" (*id.* at 40).

ARGUMENT

Petitioner contends that the court below erred in applying the inevitable discovery doctrine to uphold the admission of the drugs found in the garage. He claims that that decision conflicts with decisions of other courts of appeals. The decision of the court of appeals, however, was correct and does not conflict with the decision of any other court of appeals.

Under the inevitable discovery doctrine, unlawfully obtained evidence should not be suppressed so long as it can be shown by "demonstrated historical facts" that the evidence would inevitably have been discovered by independent lawful means. *Nix* v. *Williams*, 467 U.S. 431, 445 n.5 (1984). Here, it is certain that lawful means would have led to discovery of the drugs. As the court of appeals correctly found (Pet. App. 39), "at the time the securing of the property was ordered, a decision to seek a search warrant had been made which was in no way influenced or accelerated by Sergeant DuBois' discovery of the drugs." Indeed, the very purpose of securing the property was to maintain the status quo pending acquisition of the search warrant. In short, there can be no doubt in this case that "a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place" (*id.* at 41).[2] Accordingly, the inevitable discovery doctrine was properly invoked.

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[2]Petitioner does not dispute that the police had probable cause to obtain a search warrant at the time the property was secured, and the court of appeals in *Curry* expressly so held (751 F.2d at 448-449).

The cases on which petitioner relies do not aid his cause. Petitioner cites *United States* v. *Segura, supra*, for the proposition that evidence discovered during an unlawful prewarrant search should be suppressed despite the later acquisition of a warrant (Pet. 11).[3] *Segura* was premised on the notion that its rule was necessary to remove the incentive to disregard the Fourth Amendment (663 F.2d at 417). That premise, however, was subsequently undercut in *Nix* v. *Williams* by the Court's rejection of the argument that, in the absence of an inquiry into the good faith of the officers, the inevitable discovery doctrine would encourage constitutional violations. The Court explained (467 U.S. at 445-446) that,

> when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. * * * In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

The court of appeals in *Segura* did not mention the inevitable discovery doctrine. Moreover, the court seemed particularly influenced by the fact, not present here, that the agents in that case "went out of their way to create the circumstances that they contend constituted the emergency

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[3]We did not concede the correctness of that holding in *Segura* but did not contest it in this Court (*Segura* v. *United States*, 468 U.S. 796, 802-803 n.4 (1984)).

justifying entry" (663 F.2d at 417). In sum, it is far from clear that the Second Circuit would adhere to *Segura* and its deterrence-based rationale after *Nix* v. *Williams*, or that it would extend *Segura* to the different facts of this case.[4]

Petitioner next (Pet. 13) relies on *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), and *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985), but those cases do not help him.[5] In each of those cases, the court took the view that a later warrant-authorized search may justify admission of evidence that was seized unlawfully only if, at the time of the illegal action, the government already had begun the process of obtaining a warrant. 759 F.2d at 1206; 743 F.2d at 846.

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[4]Petitioner also relies (Pet. 11-12) on the Second Circuit's earlier decision in *United States* v. *Alvarez-Porras*, 643 F.2d 54, cert. denied, 454 U.S. 839 (1981). In that case, the court of appeals *upheld* the admission of evidence obtained during an illegal prewarrant search (643 F.2d at 65), and any suggestion that it would have done otherwise on different facts is simply dictum. In addition, the court's emphasis on the "agents' good faith in trying to comply with the warrant requirement" (*ibid.*), if read to superimpose a requirement of good faith on the inevitable discovery doctrine, cannot survive the directly contrary holding of *Nix* v. *Williams*, 467 U.S. at 445-446. Accordingly, *Alvarez-Porras* does not help petitioner.

[5]Petitioner also notes that the courts in both *Cherry* and *Satterfield* cited *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), and he appears to be relying on a conflict with that "leading case" (Pet. 13). The relevant holding of *Griffin*, however, can no longer be considered to be the law of the Sixth Circuit. That holding was that there is no inevitable discovery doctrine at all. 502 F.2d at 961 ("The assertion by police * * * that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."); see also *United States* v. *Apker*, 705 F.2d 293, 306 (8th Cir. 1983) ("Only the Sixth Circuit has explicitly rejected the inevitable discovery exception. *United States* v. *Griffin* * * *."), cert. denied, 466 U.S. 950 (1984). Since *Griffin*, both this Court and the Sixth Circuit have accepted the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U.S. at 440 n.2 (citing *Papp* v. *Jago*, 656 F.2d 221, 222 (6th Cir.), cert. denied, 454 U.S. 1035 (1981)).

Because that process had not begun in either *Cherry* or *Satterfield*, the courts declined to apply the inevitable discovery doctrine. In neither *Cherry* nor *Satterfield*, however, does the opinion indicate that a decision to seek a warrant had preceded the illegal discovery and seizure of the evidence, as was true in this case. In *Cherry*, a warrant was never sought; the attempts made to justify admission of the unlawfully seized evidence were on the ground that a warrant *could* have been obtained (759 F.2d at 1206). In *Satterfield*, the deputy sheriffs had determined at the time of the unlawful entry *not* to seek a warrant, "because a warrant probably could not have been acquired for several hours, during which time the occupants might have escaped" (743 F.2d at 843). Those cases do not help petitioner, because in this case the government had already decided to obtain a warrant when the illegal entry occurred, and the evidence in this case was not seized until after the warrant was obtained.[6]

The evident purpose of the rule adopted in *Cherry* and *Satterfield* was to discourage law enforcement agents from conducting unlawful searches with the knowledge or in the hope that they could obtain a valid warrant later. 759 F.2d at 1204-1205; 743 F.2d at 846. As the *Cherry* court explained (759 F.2d at 1204), however, officers have no incentive to take such a shortcut when they are already pursuing an alternate line of investigation that will inevitably lead them to the evidence they seek. Thus, the rule of *Cherry* and *Satterfield* is grounded on the need to establish actual "inevitability" at the time of the illegal action. See

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[6]In another Fifth Circuit case preceding *Cherry*, the court allowed the admission of evidence found during an illegal entry when a legal warrant for the premises later was obtained, even though the process of obtaining the warrant had not yet begun at the time of the initial entry. *United States* v. *Fitzharris*, 633 F.2d 416 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); accord *United States* v. *Merriweather*, 777 F.2d 503 (9th Cir. 1985), cert. denied, No. 85-6384 (Mar. 31, 1986).

759 F.2d at 1207 (emphasis added) ("we conclude that the government *has not shown* that the pistol, bullets, and pistol case would inevitably have been discovered by entirely lawful means"); see also *id.* at 1205 n.10. That need clearly was satisfied here, where a "demonstrated historical fact"—the order to secure the property pending the acquisition of a warrant—showed that the decision to seek a warrant was made before the entry into the garage.[7]

Finally, petitioner relies (Pet. 14) on *United States* v. *Owens*, 782 F.2d 146 (10th Cir. 1986).[8] There is no conflict between *Owens* and the decision below. The government's assertion in *Owens* was not that a lawful warrant would have been obtained, but that a motel maid would have found the evidence and reported it to the police (782 F.2d at 152-153). The court simply rejected, as a factual matter, the government's "highly speculative assumption of 'inevitability' " (*id.* at 153). By contrast, in the present case the government's assertion that discovery was inevitable was not at all speculative and was properly accepted by the courts below.

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[7]The discovery of the evidence by lawful means was more inevitable at the time of the illegality here than in *Nix* v. *Williams*. Although the search for the body in that case was already in progress when the officers unlawfully obtained Williams' statement, it was by no means certain that the body would be found (see 467 U.S. at 448-450). Here, by contrast, although the officers had not yet begun preparing the warrant application at the time of the unlawful entry, it had already been decided that they would seek a warrant. Moreover, as the court of appeals readily determined, the warrant would have been issued, and the subsequent search of the garage would have turned up the evidence (Pet. App. 41).

[8]Petitioner also cites the Tenth Circuit's earlier decision in *United States* v. *Romero*, 692 F.2d 699 (1982), but in that case the court upheld the admission of unlawfully seized evidence under the inevitable discovery doctrine. There is nothing in the opinion in *Romero* that is inconsistent with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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